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No. 05-1588

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In the Supreme Court of the United States

Safeguard International Fund, L.P.,

Petitioner,

v.

IFC Interconsult, AG,

Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether a federal court has subject matter jurisdiction over a garnishment where a federal judgment debtor owns a contractual right of indemnity that covers the judgment in the underlying action, and the garnishment and the judgment creditor's underlying federal action against the judgment debtor arise out of a common nucleus of operative fact.

RULE 29.6 STATEMENT

IFC Interconsult, AG is privately held and has no parent corporation. No publicly held company owns 10% or more of its stock.

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ADDITIONAL STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 203 provides in pertinent part:

> An action or proceeding falling under the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958] shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

9 U.S.C. § 207 provides in pertinent part:

> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration.

9 U.S.C. § 13 provides in pertinent part:

> The judgment [confirming the arbitration award] shall be docketed as if it was rendered in an action.
>
> The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

COUNTER-STATEMENT OF THE CASE

Petitioner Safeguard International Fund, L.P. ("the Fund") asks this Court to review a unanimous decision by the United States Court of Appeals for the Third Circuit (Roth, Fuentes, and Becker, JJ.), which held that the District Court had jurisdiction over a garnishment against the Fund brought by respondent IFC Interconsult, AG ("IFC") under Federal Rule of Civil Procedure 69.[1] The garnishment was issued in IFC's action in the District Court to confirm an arbitration award that IFC had obtained against Safeguard International Partners, LLC ("SIP").

The Fund is a limited partnership. It has equity capital of more than $300 million. C.A. App. 100-02. SIF Management, L.P. is the general partner of the Fund. Defendant SIP, in turn, is the general partner of SIF Management. Appendix to Petition for Writ of *Certiorari* ("App.") 2a. Hence, SIP exercises "significant control" over the Fund. App. 30a. At issue in the original arbitration (and in the District Court confirmation action) was plaintiff IFC's contract with defendant SIP to recruit investors for the Fund. App. 28a, 48a. The arbitration involved SIP's refusal to pay placement fees to IFC under their contract; SIP's refusal was based on the ground that it was protecting the garnishee Fund from alleged fraud by IFC. App. 28a, 49a. The three arbitrators ruled unanimously in

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[1] The Fund's Petition to the Third Circuit for Rehearing *En Banc* was unanimously denied on March 20, 2006.

favor of IFC and awarded it over $4 million (with interest). App. 49a-50a.

IFC brought its confirmation action in federal court against SIP pursuant to the Federal Arbitration Act, which confers original jurisdiction on federal courts to confirm and enforce awards entered pursuant to the Convention on the Enforcement of Foreign Arbitral Awards. *See* 9 U.S.C. § 203. [2] (The arbitration award fell under the Convention because IFC is a Swiss Corporation.) The District Court confirmed the award and entered judgment for IFC.[3]

Claiming it had no assets, defendant SIP failed to pay. IFC then sought to enforce its judgment by initiating a garnishment against the Fund under Rule 69. IFC's garnishment was based on the Fund's contractual duty to indemnify SIP under their partnership agreement for liabilities incurred "by reason of [SIP's] connection to or relationship with" the Fund. App. 5a (quoting Safeguard International Fund, L.P. Amended and Restated Agreement of Limited Partnership ¶ 2.10). The Fund responded to the writ of garnishment by saying (among other things) that it was not obliged to indemnify because IFC had

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[2] There was no diversity jurisdiction because there were foreign citizens on both sides of the case. App. 39a n.2.

[3] The Third Circuit affirmed the District Court's judgment confirming the arbitration award and SIP did not file a petition for a writ of *certiorari*. Thus, the underlying arbitration and confirmation proceedings are final and their merits are not implicated by the petition currently pending before this Court.

defrauded the Fund, the same defense that SIP had raised in the arbitration. C.A. App. 136.

Garnishment is "a procedural mechanism for the enforcement of judgments." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 83 n.10 (1988). The judgment creditor (typically the plaintiff) stands in the shoes of the judgment debtor (typically the defendant). The judgment creditor may collect debts owed to the judgment debtor by third parties since such debts are really the judgment debtor's property. If the garnishee disputes the debt, that dispute is resolved in the trial court as part of the garnishment proceeding. When such third parties (garnishees) have liability, it is to the judgment debtor, not to the judgment creditor. Put in terms of this case, IFC did not contend that the Fund was directly liable to it. Rather, the Fund was liable to SIP as an indemnitor of SIP's obligation to IFC, and so only derivatively liable to IFC.[4]

The question before the Third Circuit was thus quite narrow: whether the District Court had subject matter jurisdiction over IFC's garnishment of SIP's contractual claim for indemnification from the Fund under the specific terms of the SIP/Fund partnership agreement. The Third Circuit answered this question in the affirmative. In doing so, the Court did not (contrary to the Fund's headline arguments here)

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[4] It is undisputed that Pennsylvania (the forum state here), like many states, deems this claim for indemnification a garnishable debt that the Fund owes SIP. *See, e.g., Di Gregorio v. Skinner*, 41 A.2d 653, 653-54 (Pa. 1945).

"expand" federal court jurisdiction, nor did it somehow "transform" Rule 69 into a grant of jurisdiction such that jurisdiction "exists over all garnishment proceedings brought pursuant to Rule 69 of the Federal Rules of Civil Procedure." Petition at 2. It simply applied well-settled law to the undisputed facts of the case, and held that the District Court had jurisdiction to enforce its own judgment where IFC's confirmation action against SIP and its garnishment against the Fund arose from a common nucleus of operative fact. There is no issue presented that merits this Court's review.

REASONS FOR DENYING THE PETITION

To excite undeserved interest in its arguments, the Fund misconstrues the Third Circuit's opinion and then, having misstated or exaggerated the issues that would be before this Court, asserts three grounds that, it says, would justify this Court's review. The Fund is wrong.

The Third Circuit did not expand federal jurisdiction. Nor did it hold that Rule 69 confers federal jurisdiction, nor that federal jurisdiction exists over all garnishments. To the contrary, the Third Circuit made clear that the District Court's jurisdiction over IFC's garnishment against the Fund was based not on Rule 69, but on the District Court's jurisdiction to enforce its own judgment where the garnishment and the underlying federal action arose out of a common nucleus of operative fact.

There is nothing surprising about this holding: this Court itself made clear in *Peacock v. Thomas*, 516 U.S.

349, 356 (1996) (the case on which the Fund primarily relies), that federal courts have "ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments -- including attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances." Thus, far from supposing Rule 69 itself to grant jurisdiction, the Third Circuit simply authorized the District Court to exercise jurisdiction through the very type of enforcement mechanism that this Court expressly approved in *Peacock*.

Nor did the Third Circuit hold that "ancillary jurisdiction exists over all garnishment proceedings brought pursuant to Rule 69." Petition at 2. Rather, the Court was careful to explain that IFC's confirmation action against SIP and its garnishment against the Fund arose from a "common nucleus of operative fact" because defendant SIP controlled the garnishee Fund, because IFC's original action against SIP involved obtaining the placement fees it had earned by recruiting investors for the Fund, and because SIP refused to pay the placement fees on the ground that IFC allegedly had defrauded the Fund. App. 28a, 49a. Although the Fund downplays this aspect of the Third Circuit's opinion, *see* Petition at 15 (emphasis added) ("[t]he Third Circuit made no *serious* claim of factual interdependence [between the two actions]"), certainly the Fund's self-serving disagreement with the Court's ruling on this issue does not present an issue worthy of this Court's review.

As to the Fund's specific arguments, *first*, the Fund says that the Third Circuit's opinion is inconsistent with this Court's precedents -- namely, *Peacock* and *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994). Far from being inconsistent in any way, both cases fully support -- in fact, compel – the Third Circuit's holding.

In *Peacock*, the Court expressly approved of federal jurisdiction over a garnishment, and distinguished such a case – in which jurisdiction is proper -- from the case then before it involving an attempt to collect on a judgment in a new action under a "piercing-the-corporate-veil" theory -- in which, the Court held, jurisdiction is not proper. In *Kokkonen*, the action was settled, jurisdiction had been relinquished, and the facts at issue in the subsequent action were "quite separate" from those in the first. 511 U.S. at 381. In contrast, here there was a judgment, the District Court never relinquished jurisdiction to enforce the judgment, and the garnishment through which the judgment was sought to be enforced was tied to the merits of the underlying case.

Second, the Fund asserts that the Third Circuit's opinion "deepens an already entrenched circuit split that has stubbornly persisted following this Court's opinion in *Peacock*." Petition at 11. Yet, in support of this rhetorical flourish, the Fund cites only one post-*Peacock* decision on garnishment, *Hudson v. Coleman*, 347 F.3d 138 (6th Cir. 2003). And *Hudson* simply found that the garnishment in that case raised issues of fact outside the "common nucleus of operative fact" at issue in the original action. *See* 347 F.3d at 146. By

contrast, the Third Circuit here held that IFC's garnishment raised no new issues of fact and was within the "common nucleus of operative fact" occupied by IFC's original claims against SIP. So there is no conflict between the two decisions, let alone an "entrenched circuit split."

Third, the Fund argues that the issue presented is "recurring and important." Petition at 26. That is hardly the case. Neither the fictive issue that the Fund presents nor the issue that the Third Circuit actually decided is recurring or particularly important. There have been only a handful of cases involving federal jurisdiction over garnishments since *Peacock*; that fact alone speaks volumes. The issue presented actually might be described more aptly as "arcane" than as "important" or "recurring."

I. The Third Circuit Did Not Hold That Rule 69 Creates Federal Subject Matter Jurisdiction Over Every Garnishment.

Because the Fund distorts the Third Circuit's opinion in an effort to make the case appear more "certworthy" than it is, it is important to set forth at the outset just what the Court of Appeals did -- and what it did not do.

The Fund maintains that the Third Circuit held that a district court has subject matter jurisdiction over "any garnishment" and "stubbornly" followed its own "broad holding" in *Skevofilax v. Quigley*, 810 F.2d 378 (3d Cir. 1987) (*en banc*), despite this Court's decision in *Peacock* "rejecting *Skevofilax*." Petition at 11. This

argument mischaracterizes not only the decision below, but also both *Skevofilax* and *Peacock*.

First, there was nothing improper or unusual about the Third Circuit beginning its jurisdictional analysis by looking to its own prior *en banc* decision in *Skevofilax*, particularly since the Fund conceded that if *Skevofilax* "is still 'good' law, it governs this case and the District Court had ancillary jurisdiction over the garnishment action." App. 16a. Nor did the Court of Appeals blindly follow *Skevofilax* or "stubbornly" ignore this Court's decision in *Peacock*. Rather, after a full and careful analysis, the Court concluded that *Peacock* was fully consistent with the result in *Skevofilax*. *See* App. 14a-29a. (As discussed *infra*, the Court of Appeals was entirely correct.)

Second, neither *Skevofilax* nor the decision here holds that Rule 69 creates federal jurisdiction over any and all garnishments. As Justice Scalia has observed, "it is quite impossible for [a court's] holding to be any broader" than the facts of the case. *American Dredging Co. v. Miller*, 510 U.S. 443, 457 (1994).

In *Skevofilax*, the defendant police officer properly could have impleaded or asserted a cross-claim for indemnification against the garnishee township prior to judgment because the claim for indemnification and plaintiff's original claim arose out of the same "nucleus of operative fact." *See* 810 F.2d at 385-86 (Gibbons, J.); *see also id.* at 389 (Becker, J., concurring). Similarly, here, as the Court of Appeals made clear, SIP properly could have impleaded the Fund prior to judgment had it chosen to do so. That Court explained:

There was a "common nucleus of operative facts" between the arbitration confirmation and the garnishment in this case because the original arbitration matter which the District Court confirmed dealt with IFC's contract with SIP to recruit investors for the Fund, which SIP managed via SIF Management, L.P. *When SIP refused to pay the placement fees to IFC, it did so on the grounds that it was protecting the [garnishee] Fund from the alleged fraud.*[5]

SIP's calculated decision not to implead the Fund should not be adequate to defeat IFC's

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[5] The Fund attempts to evade the Court of Appeals' ruling that "[t]here was a 'common nucleus of operative facts' between the arbitration confirmation and the garnishment" by saying that "the district court proceedings to confirm IFC's arbitration award involved only the propriety of the arbitration procedures themselves, and did not address the merits of the dispute." Petition at 15. But the Fund forgets that it impliedly conceded that the garnishment was part of the same case or controversy as the arbitration when it sought to defend the garnishment by putting at issue the same defenses of fraud and breach of trust litigated in the arbitration – contentions that were rejected by the Third Circuit. App. 28a. Moreover, a federal district court in a confirmation proceeding under the Federal Arbitration Act typically does not conduct a *de novo* review of the merits of the dispute. Petition at 15. If this somehow prevented the court from exercising jurisdiction to enforce a judgment, judgments confirming arbitration awards would be relegated to second-class status, entitled to less effect than other judgments, in contravention of the Federal Arbitration Act's mandate that a judgment confirming an arbitration award is entitled to "the same force and effect, in all respects, as . . . a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered." 9 U.S.C. § 13.

> garnishment action. The possibility of ancillary jurisdiction via a cross-claim indicates that there should also be ancillary jurisdiction for a garnishment action that lets the garnishor [here, IFC] stand in the shoes of the potential cross-claimant [here, SIP].

App. 28a (emphasis added).

The Court of Appeals' holding, both in *Skevofilax* and here, is simply that a district court has jurisdiction over a garnishment action based on an indemnification claim where that claim and the original claim arise out of a "common nucleus of operative fact." There is nothing broad, unprecedented, surprising or remarkable about this holding. Indeed, this Court never has questioned that a third-party claim for indemnification is included within the "same case or controversy" as plaintiff's original claim against defendant. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978) (such a claim "depends at least in part upon the resolution of the primary lawsuit . . . . Its relation to the original complaint is thus not mere factual similarity but logical dependence"); *see also Caterpillar Inc. v. Lewis*, 519 U.S. 61, 66 n.1 (1996).

On the Fund's theory, the procedural posture in which a third-party claim is asserted would determine the existence of federal court jurisdiction, a proposition that cannot be correct. The Fund's argument is in essence that a garnishment based on the defendant's claim for indemnification by a third party is outside federal jurisdiction even though that very same claim is within the district court's jurisdiction when asserted

prior to the entry of judgment in the underlying action. But, as the Fund itself acknowledges, it is "fundamental error" to allow a procedural device to "create or withdraw federal jurisdiction." Petition at 12 (quoting *Kroger*, 437 U.S. at 370). This concern rings particularly true in a case like this where, as the Third Circuit noted, the close relationship between defendant SIP and the garnishee Fund creates "a strong overtone of strategic behavior by related parties." App. 31a; *see also* App. 28a ("SIP's calculated decision not to implead the Fund should not be adequate to defeat IFC's garnishment action.").

Thus, the Third Circuit's holding is not that Rule 69 authorizes a district court to exercise jurisdiction over all garnishments. Instead, the Court's routine, narrow holding is that jurisdiction exists over a garnishment where the garnishment and the underlying action arise from a common nucleus of operative fact. As we now show, once the Third Circuit's opinion is properly construed, it is evident that its holding is consistent with this Court's precedents and with those of other circuits, and presents neither a recurring nor an important issue meriting this Court's review.

II. The Third Circuit's Opinion Is Consistent With, If Not Compelled By, This Court's Precedents.

Having constructed a straw man -- that the Third Circuit adopted a blanket holding that Rule 69 creates federal court jurisdiction over every garnishment -- the Fund then proceeds to knock it down, asserting that such a rule is inconsistent with this Court's precedents, namely *Peacock* and *Kokkonen*. But the critical

question for this Court is whether the Third Circuit's actual holding in this case (as opposed to the Fund's erroneous characterization of that holding) is consistent with *Peacock* and *Kokkonen*. Plainly, it is.

First, *Peacock* fully supports the decision below. In *Peacock*, the plaintiff had obtained a judgment against the corporate defendant under ERISA. The plaintiff then sought to bring a new and separate action against the corporation's primary shareholder after jurisdiction in the first action had been relinquished, on a theory of "piercing the corporate veil." This Court held that jurisdiction was lacking because of the lack of a factual nexus between the initial ERISA action and the subsequent piercing-the-corporate-veil action. In so holding, this Court distinguished the case before it from a garnishment case and made clear that nothing in its opinion altered the long-standing rule that federal jurisdiction over garnishments is appropriate. The Court explained:

> Without jurisdiction to enforce a judgment entered by a federal court, "the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." In defining that power, we have approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments -- including attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances.

Id. at 356 (citation omitted). To emphasize the point, the Court in a footnote focused specifically on Rule 69 as providing such an appropriate execution method. *See id.* at 359 n.7 ("Rule 69(a), for instance, permits judgment creditors to use any execution method consistent with the practice and procedure of the state in which the district court sits."). *Peacock* thus fully supports, if not compels, the result here.

Despite this, relying solely on another footnote in *Peacock*, the Fund argues that *Peacock* "disapproved" of *Skevofilax* (and so presumably of the result here). Petition at 16. This Court's single reference to *Skevofilax* in *Peacock* cannot bear such weight.

The *Peacock* Court mentioned *Skevofilax* in a footnote comparing several circuit court decisions on ancillary jurisdiction. 516 U.S. at 352 n.2. But *Peacock* did not in any way suggest that its holding rejecting jurisdiction over the plaintiff's subsequent lawsuit in that case was intended to extend to garnishments. Instead, as the Third Circuit explained, the footnote merely identified a number of cases discussing "general questions of ancillary jurisdiction and is no way dispositive of whether *Peacock* applies to garnishment." App. 17a-18a. *See also Wilson v. City of Chicago*, 120 F.3d 681, 684 (7th Cir. 1997). Moreover, if this Court had truly intended such a radical truncation of the federal courts' longstanding jurisdiction over garnishments, it is "strange that it would have done so in a footnote," *Carmell v. Texas*, 529 U.S. 513, 538 (2000), and even stranger that it would have then gone on expressly to *approve* federal jurisdiction over garnishment as a method of execution.

More substantively, the Fund's reading of the *Peacock* footnote ignores the glaring factual and legal differences between these two cases. As the Third Circuit explained:

> Factually, *Peacock* is a bird of a different feather than *Skevofilax*, and we do not believe that the Supreme Court intended *Peacock* to extend to the *Skevofilax* situation because garnishment is different from other types of liability. The key difference between *Peacock* and *Skevofilax* is that *Peacock* addressed whether ancillary jurisdiction was available to find primary liability, whereas *Skevofilax* dealt with ancillary jurisdiction to seek satisfaction of a judgment from a party that is alleged to be secondarily liable based on an indemnification agreement.

App. 18a-19a. In light of these differences, there simply is no way to tease a holding from this footnote in *Peacock* that would so severely limit the availability of garnishment.

In a futile attempt to find such a holding, the Fund repeatedly seizes upon the statements in *Peacock* that a federal court lacks jurisdiction "in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment," Petition at 3, 7, 14, 22, 24 (quoting *Peacock*, 516 U.S. at 357), or "where 'the relief [sought is] of a different kind or on a different principle' than that of the prior decree." Petition at 16 (quoting *id.* at 358). According to the Fund, the Third Circuit's opinion is inconsistent with this language because IFC's garnishment sought relief "of a different kind or on a

different principle" than the original action. Petition at 16.

There are numerous flaws in the Fund's argument. First, the Fund presents the *Peacock* statement ("relief . . . of a different kind or on a different principle") as if it were a jurisdictional test. But the test for supplemental jurisdiction is whether the additional claims are "part of the same case or controversy" as the claims within the district court's original jurisdiction, 28 U.S.C. § 1367(a), *i.e.*, whether the original and the additional claims "derive from a common nucleus of operative fact," *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966), not whether the original and the additional claims seek "relief of a different kind or on a different principle." Certainly, had this Court intended *Peacock* to overrule the *Gibbs* test and to rewrite Section 1367, it would have said so -- particularly given the mandatory language of 28 U.S.C. § 1367 (emphasis added) ("[s]upplemental jurisdiction *shall* include claims that involve the joinder . . . of additional parties.").

Second, as discussed *supra*, the Third Circuit in fact held, based on the summary judgment record before it, that the underlying original proceeding and IFC's garnishment derived from a common nucleus of operative fact. App. 28a. Supreme Court Rule 10 makes clear that this Court generally does not grant petitions for *certiorari* to review the correctness of that type of ruling.

Lastly, the Fund appears to be laboring under a misconception of what "typical" garnishments look like. Petition at 9, 24. Garnishments almost always are "on

a different principle" than the claim on which the judgment itself is based. The Fund makes no attempt to explain why these "typical" garnishments, "such as for a salary," pass jurisdictional muster, or why a garnishment for a salary should be thought not to be "on a different principle" than the original action when the original action may not (and, in the "typical" case, will not) have anything to do with the defendant's salary. [6]

The bottom line is that, as the Third Circuit correctly noted, contrary to this Court's explicit approval in *Peacock* of a "broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments," the Fund's argument would deprive federal courts of jurisdiction over many garnishments (including any garnishment in which the garnishee disputes its debt). App. 20a. This Court could not have intended that this would be the consequence of *Peacock*.

The Fund's contention that the Third Circuit's opinion is inconsistent with *Kokkonen* is equally meritless. In *Kokkonen*, the Court held that a district court could not exercise jurisdiction over an action for breach of a settlement agreement resolving a prior

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[6] It is ironic, indeed, that the Fund would describe garnishment of a salary as a "typical" garnishment because, in the real world, wage garnishments are heavily regulated in most jurisdictions, including Pennsylvania. *See* 42 Pa. C.S. § 8127(a) ("The wages, salaries and commissions of individuals shall while in the hands of the employer be exempt from any attachment, execution or other process.").

federal action unless the district court had retained jurisdiction to enforce the agreement or incorporated its terms into the order dismissing the case, neither of which the district court had done. 511 U.S. at 380-81. The Court noted in addition that the facts at issue in the action for breach of the settlement agreement were "quite separate from the facts to be determined in the principal suit," and hence the subsequent action was "more than just a continuation or renewal of the dismissed suit." 511 U.S. at 378.

The Fund contends that IFC's garnishment is somehow like the subsequent lawsuit to enforce the settlement agreement in *Kokkonen*. Petition at 17-18. But the comparison fails completely. In *Kokkonen*, the prior action had been voluntarily dismissed and the district court had relinquished jurisdiction. Here, judgment had been entered and the District Court indisputably retained jurisdiction over supplementary proceedings to enforce its judgment through execution proceedings. Moreover, unlike in *Kokkonen*, the facts at issue in the garnishment were not "separate from the facts . . . determined in the principal suit." For the reasons discussed *supra*, the Court of Appeals correctly held that all the claims arose from a "common nucleus of operative facts." App. 28a.

In sum, the Third Circuit's holding that the District Court had jurisdiction over IFC's garnishment against the Fund does not conflict with any of this Court's precedents.

III. The Third Circuit's Opinion Does Not Conflict With The Holdings Of Other Circuits.

The Fund asserts that the Third Circuit's decision in this case "deepens an already entrenched circuit split that has stubbornly persisted following this Court's opinion in *Peacock*." Petition at 11. Yet the Fund acknowledges that only three circuits even have addressed the issue since *Peacock* (the Third, the Sixth, and the Seventh). *See* Petition at 18-19 n.4.[7] The Seventh has reached the same result as the Third. *See Yang v. City of Chicago*, 137 F.3d 522, 526 (7th Cir. 1998); *Wilson*, 120 F.3d at 684. As evidence of the

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[7] While acknowledging that only the Third, Sixth, and Seventh Circuits have addressed federal jurisdiction in the context of garnishment since *Peacock*, the Fund cites post-*Peacock* decisions by circuits that it asserts are divided on "similar issues." *See* Petition at 18-19 n.4. In fact, there is no conflict even as to these "similar issues": every circuit that has considered the matter has read *Peacock* to authorize federal jurisdiction over judgment execution mechanisms. *See, e.g., Cygnus Telecomm. Tech., LLC v. TotalAccess.com, Inc.*, 345 F.3d 1372 (Fed. Cir. 2003); *Condaire, Inc. v. Allied Piping*, 286 F.3d 353 (6th Cir. 2002); *Epperson v. Entertainment Express, Inc.*, 242 F.3d 100 (2d Cir. 2001); *Dulce v. Dulce*, 233 F.3d 143 (2d Cir. 2000); *U.S.I. Props. Corp. v. M.D. Contr. Co.*, 230 F.3d 489 (1st Cir. 2000); *Cigna Prop. & Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412 (9th Cir. 1998). Even the First Circuit – the only circuit that the Fund identifies as being on the other side of this supposed split on "similar issues" – itself recognizes that, "[w]here the state procedural enforcement mechanisms incorporated by Rule 69(a) allow the court to reach the assets of the judgment debtor in the hands of third parties in a continuation of the same action, such as garnishment or attachment, federal jurisdiction is clear." *U.S.I. Props.*, 230 F.3d at 496.

allegedly "stubbornly persist[ing]" post-*Peacock* circuit split, the Fund thus relies on a single putatively-conflicting decision, the Sixth Circuit's decision in *Hudson*.[8]

In *Hudson*, the plaintiff obtained a judgment against a defendant police officer under 42 U.S.C. § 1983, and then named the city that employed the defendant as a garnishee based on the city's contractual duty to indemnify the defendant. The Sixth Circuit held that the district court lacked jurisdiction over the garnishment.

The Sixth Circuit explained that factual issues concerning whether the defendant had acted within the scope of his employment (a necessary predicate to the city's indemnity obligation) were unresolved by the original action and not part of the same case or

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[8] As further evidence of a putative circuit split, the Fund cites a pre-*Peacock* case, *Berry v. McLemore*, 795 F.2d 452 (5th Cir. 1986), which, like *Skevofilax*, was cited in *Peacock*'s footnote 2. In *Berry*, the Fifth Circuit held that it was bound by its own prior precedent that "garnishment . . . is an action separate and independent from the action giving rise to the judgment debt." 795 F.2d at 455 (citing *Butler v. Polk*, 592 F.2d 1293 (5th Cir. 1979)). *Berry* concluded that under this prior holding, garnishment always requires an independent basis of original federal jurisdiction. *Id.* at 455-56. Clearly, *Berry* is not evidence of an "entrenched" circuit split that *Peacock* somehow failed to resolve. Indeed, to the extent that *Peacock* (which dealt with a piercing-the-corporate-veil claim) can be deemed to have resolved any circuit split relating to garnishment at all, it would have been resolved *against Berry*: *Peacock* makes clear that garnishments *can* fall within federal court jurisdiction.

controversy.[9] Thus, it held that "legitimate, unresolved disputes concerning whether conduct occurs within the scope of employment or authority deprives a federal court of ancillary jurisdiction in a garnishment action pursuant to *Peacock*." *Hudson*, 347 F.3d at 146.[10]

By contrast, in this case, the Third Circuit held that once SIP's liability had been determined, the only remaining issues to be resolved as to the Fund's duty to indemnify SIP were *legal* issues concerning the language of the indemnification clause in the partnership agreement that created the Fund. App. 27a. The Fund eagerly misinterprets the Third Circuit's opinion as somehow supposing that a court "might have jurisdiction to resolve questions of law when it would *not* have jurisdiction to resolve questions of fact in the exact same case." Petition at 10 (emphasis in original). The Third Circuit said no such thing. It simply ruled that the remaining issues concerning the Fund's duty to indemnify SIP were not issues of *fact*, and so, by definition, were not outside the

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[9] The Sixth Circuit considers scope of employment "a question of fact for the jury." *Stallworth v. City of Cleveland*, 893 F.2d 830, 834 (6th Cir. 1990). The original action under Section 1983 dealt with the distinct factual issue whether the defendant had acted "under color of law."

[10] It should not be surprising that, depending on the facts presented, courts have reached varying conclusions on the jurisdictional issue. The Sixth Circuit itself has concluded that there could be federal subject matter jurisdiction over a garnishment with no independent basis for federal jurisdiction. *Condaire*, 286 F.3d at 357.

"common nucleus of operative fact" at issue in the main action.

In sum, there is no conflict between the Third Circuit's decision here and the Sixth Circuit's decision in *Hudson*. Each applied the "same case or controversy" test, and on different facts reached different conclusions.

IV. This Case Does Not Present Any Important Or Recurring Issue.

Almost as an afterthought, the Fund asserts that *certiorari* is warranted because "[t]he issue presented is recurring and important." Petition at 26. The Fund is wrong for at least two reasons.

First, as discussed above, "the issue" that the Fund's petition presents -- whether a federal court has jurisdiction over all Rule 69 garnishments -- is *not* the issue that the Court of Appeals decided. Rather, the Court's decision was carefully tailored to the facts before it, and its holding is limited to those facts: where the garnishment and the original underlying action arise from a common nucleus of operative fact, then federal jurisdiction is proper.

Second, even "the issue" that the Fund presents could hardly be considered "recurring" or "important." Only three circuits have considered the issue of federal jurisdiction over garnishments since this Court's decision in *Peacock* (the Third, Sixth, and Seventh). Two of them (the Third and Seventh) held, on the facts before them, that such jurisdiction exists over garnishments; one (the Sixth) reached a different

conclusion based on the particular facts before it on one occasion, and on another determined that such jurisdiction did exist. To the extent that there was any confusion on these matters before *Peacock*, *Peacock* laid it to rest. Far from being "recurring and important," the issue is seldom-litigated and arcane.

Moreover, if the Fund's view of the law were correct, *Peacock* would preclude federal jurisdiction over many garnishments (and, for that matter, over many executions and attachments), which have been the traditional means of enforcing federal judgments since the dawn of the Republic. And so, by the Fund's view, federal courts' "ancillary jurisdiction over a *broad range* of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments -- including attachment, mandamus [and] garnishment," *Peacock*, 516 U.S. at 356 (emphasis added), would be narrowly constricted, indeed. And if the Fund's view of the law were correct, collecting on federal judgments would become increasingly expensive and time-consuming, and federal adjudications would be rendered, as the Third Circuit put it, "toothless." App. 21a.

Such a radical interpretation defies precedent, common sense, and practicality. No court has read *Peacock* that way, and it is inconceivable that this Court intended to mandate such a far-fetched result -- particularly by way of a "compare with" citation signal in a footnote.

On the facts of this case, the Third Circuit decided the relatively obscure issue correctly.

CONCLUSION

For these reasons, the petition should be denied.

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